Supreme Court, U.S.
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No. 99-1801

In The

Supreme Court of the United States

MICHAEL C., A MINOR BY HIS PARENT AND NEXT FRIEND, STEPHEN C.; STEPHEN C., INDIVIDUALLY, AND ON HIS OWN BEHALF, BOTH OF

Petitioners,

v.

THE RADNOR TOWNSHIP SCHOOL DISTRICT, PENNSYLVANIA DEPARTMENT OF EDUCATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT RADNOR TOWNSHIP SCHOOL DISTRICT

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QUESTION PRESENTED FOR REVIEW

The question to which the Petition for Writ of Certiorari in this case addresses itself is more accurately stated as follows:

Whether the Appeals Court, in affirming the district court's decision granting Respondent Radnor Township School District's motion for summary judgment, has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important question of federal law that has not been, but should be, settled by this Court; has decided an important federal question in a way that conflicts with relevant decisions of this Court; or has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power when the decision of the District Court regarding the implementation of the "pendency clause" of the Individuals with Disabilities Education Act in a situation when a student with disabilities moves from State A to State B, was consistent with Congress' legislative authority and design in enacting the Act, was consistent with the interpretation by the United States Department of Education – the federal agency charged with the administration of the Act – and was consistent with relevant caselaw?

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STATEMENT OF THE CASE

The case below was predicated upon the Individuals with Disabilities Education Act ("IDEA") and the pendency requirements under the Act. The factual background of this dispute is straightforward. Michael C., hereinafter "the student," and Stephen C., hereinafter "the parent," or collectively "Petitioners," relocated to Pennsylvania, and to Respondent Radnor Township School District, hereinafter "the District," from the District of Columbia in August of 1997. The parent demanded that the District implement the student's then-existing District of Columbia Individualized Education Program ("IEP") at the Hill Top School, a private school that is not approved by the Commonwealth of Pennsylvania for the provision of special education to students with disabilities, because he felt that it best replicated the Lab School which the student had attended while a resident of the District of Columbia. The District reviewed the IEP and found nothing in it warranting so restrictive a placement and immediately sought permission to evaluate, which it began immediately and completed in an expedited fashion. At the same time, the District convened an IEP team well in advance of the beginning of the school term and, after reviewing records forwarded by the parent, determined that it could implement the District of Columbia IEP in either an emotional support ("ES") class or a learning support ("LS") class in Radnor High School. The District so notified the parent of this determination in writing, offering him the choice of either the ES or LS class in conjunction with placement in the high school program pending completion of the evaluation. Neither the student nor his parent attended the IEP team meeting.

The parent however rejected the District's offer out-of-hand in early September of 1997. The student never attended a District-sponsored program; instead, during the first six weeks of the 1997-1998 school term, the parent unilaterally placed him at the Hill Top School, the non-approved private school in which the parent had demanded the District place the student. As the District was completing its evaluation in mid-October of 1997, and an IEP team was preparing to convene to discuss a District-sponsored placement for the remainder of the school year, the student and his parent relocated again, to the State of New Jersey. The parent again refused to participate in the IEP team meeting, and the team never convened.

In January 1998, the parent requested a due process hearing demanding tuition reimbursement for the unilateral placement of the student at the Hill Top School during the first six weeks of the 1997-1998 school term. After a failed attempt to mediate the matter, a hearing convened on April 30, 1998, and the local-level hearing officer rendered a written decision in favor of the District on May 13, 1998. The parent filed exceptions with a state-level appeals panel, and, on June 26, 1998, the panel affirmed the decision of the hearing officer. On September 2, 1998, the parent filed a Complaint in the United States District Court for the Eastern District of Pennsylvania, initiating an action against both the District and the Commonwealth of Pennsylvania, hereinafter the "Commonwealth". The matter was assigned to the Honorable Charles R. Weiner. The administrative record was filed with the court by the Right to Education Office on December 7, 1998. The parties agreed that this matter

could be decided on cross-motions for summary judgment based upon the administrative record without further evidence. On February 5, 1999, Judge Weiner issued a Memorandum Opinion and Order wherein judgment was entered in favor of both the District and the Commonwealth. Petitioners filed an appeal to the Third Circuit Court of Appeals on February 9, 1999. On January 14, 2000, the Third Circuit affirmed the order of the District Court granting summary judgment in favor of the District and the Commonwealth. On February 11, 2000, the Third Circuit denied Petitioners' request for a rehearing. On May 9, 2000, a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit was filed with this Court. The District opposes this petition.

ARGUMENT

REASON FOR DENYING THE WRIT

Contrary to the assertions of Petitioners, the Third Circuit has interpreted the "pendency clause" of the Individuals with Disabilities Education Act correctly and in a manner that is consistent with Congress' legislative authority and design in enacting the Act, consistent with the policy statement of the United States Department of Education – the agency charged with the administration of the IDEA – and consistent with relevant caselaw.

In support of their request, the Petitioners appear to proffer two principal legal theories under which they claim to be entitled to the tuition reimbursement they seek – violation of the IDEA's "stay-put" provision and infringement on the constitutionally protected right to

interstate travel. For the reasons that follow, both arguments are without merit. Therefore there is no reason, compelling or otherwise, for this Court to exercise its discretion to review the decision of the Third Circuit.

Petitioners contend that the IDEA mandates that a student who is evaluated and determined to need special education and related services in accordance with the IDEA-mandated multidisciplinary team process, *see* 20 U.S.C. § 1414(a)-(c), and for whom an IEP is developed in accordance with the IDEA-mandated IEP team process, *see id.* at § 1414(d)-(f), in one State is entitled to immediate acceptance and implementation of that evaluation and IEP upon relocating to another State. Such a mandate, however, appears nowhere in the IDEA itself, explicitly or implicitly; and as the Third Circuit correctly acknowledged, failure to include such a mandate is completely consistent with the legislative design for the Act envisioned by Congress – to encourage states to provide meaningful education to individuals with disabilities. Petitioners assert that such a mandate derives from the so-called "stay-put" provision of the Act. That provision, which has been part of the Act in one location or another since its initial enactment as the "Education of the Handicapped Act" in 1975,[1] simply precludes any change in the "then-current educational placement of the child" pending completion of the administrative and judicial

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[1] Prior to June 4, 1997 and the enactment of the latest round of revisions and amendments to the Act, the stay-put provision was located in 20 U.S.C. § 1415(e)(3). With language slightly modified to address issues not present in this case, the provision now appears in § 1415(j).

proceedings laid out by Congress in Section 1415 of the Act, 20 U.S.C. § 1415, to resolve disputes between parents and the local educational agency ("LEA") over identification, evaluation, program, and placement issues and over concerns with the implementation of programming for the student with disabilities. *See* 20 U.S.C. § 1415(j).

In determining that the District had no obligation under the "stay-put" provision to implement an out-of-state IEP, the administrative hearing officer, the district court judge, and the court of appeals properly relied upon the interpretation of this portion of the IDEA by the United States Department of Education ("USDE"), the federal agency charged with the administration of the IDEA. Through an Office of Special Education Programming ("OSEP") policy memorandum, the USDE makes clear that when a disabled student moves from State A to State B, the State B school district is not required to adopt the most recent evaluation and implement the most recent IEP developed for the student with disabilities by the State A school district.

In support of their request, Petitioners suggest that by its reliance on the USDE's guidance and its promotion of the legislative scheme of the Act, the Third Circuit significantly departed from this Court's decision in *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). The *Honig* case is not dispositive of the issue that was presented to the court of appeals in the instant matter. *Honig* involved an interpretation of the "pendency clause" of the Act related to the obligation of a district that developed an IEP for a student with disabilities and then sought to modify the IEP through disciplinary exclusion of the student without the consent of the student's

parents, *see id.* at 323-29, 108 S.Ct. at 604-607. The facts in that matter are clearly distinguishable from the instant case. In fact, the only connection between this case and *Honig* is contained in the Court's *obiter dictum* in *Honig* wherein the "stay-put" provision has been construed broadly as the embodiment of a Congressional "presumption in favor of the child's current educational placement." *See id.* at 328, 108 S.Ct. at 606.

In addition, the Petitioners offer absolutely no support for their assertion that Pennsylvania special education standards and regulations establish a more liberal standard for interstate transfers which would require the District to implement an out-of-state IEP. Not only do the standards and regulations fail to establish a higher standard, they fail to even mention interstate transfers. The record is clear that the District more than complied with the IDEA and the requirement established by the USDE for interstate transfers.

Petitioners also appear to believe that the refusal of the District to place the student in the private school of the parent's choice immediately upon their relocation to Pennsylvania, and the insistence on the part of the District that it conduct an evaluation and develop an IEP in accordance with Pennsylvania law prior to committing to any program and placement other than an interim one, somehow impaired their constitutionally protected "right to interstate travel." They cite and rely heavily upon the recent decisions of this Court in *Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) and the Third Circuit in *Maldonado v. Houstoun*, 157 F.3d 179 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130, 119 S.Ct. 1802, 143 L.Ed.2d 1007 (1999), in support of their contention. Their

reliance on these cases is ill-founded because they stand for the proposition that movement into a new State of residence should not result in the receipt of lesser benefits than those enjoyed by the residents of the new State. In the instant matter, Petitioners are seeking greater benefits than would be afforded a Pennsylvania resident related to pendency. Therefore, their assertion of this interpretation of pendency is clearly inconsistent with the compelling interest and legitimate state purpose of the Commonwealth of Pennsylvania to carry out its plan for the implementation of the IDEA submitted to, and approved by, the USDE.

As more fully described below, none of the above legal theories proffered by Petitioners provides a compelling reason for this Court to exercise its discretion and review the decision of the Third Circuit.

I. The "Stay-put" Provision of Individuals with Disabilities Education Act Did Not Require the District to Implement an Out-of-State IEP.

A. The IDEA and Interpretation by the United States Department of Education

Petitioners contend that the IDEA mandates that a student who is evaluated and determined to need special education and related services in accordance with the IDEA-mandated multidisciplinary team process, *see* 20 U.S.C. § 1414(a)-(c), and for whom an individualized education program ("IEP") is developed in accordance with the IDEA-mandated IEP team process, *see id.* at § 1414(d)-(f), in one State is entitled to immediate acceptance and implementation of that evaluation and IEP

upon relocating to another State. Such a mandate, however, appears nowhere in the IDEA itself, explicitly or implicitly. Petitioners assert that the mandate derives from the so-called "stay-put" provision of the Act. That provision, which has been part of the Act in one location or another since its initial enactment as the "Education of the Handicapped Act" in 1975, simply precludes any change in the "then-current educational placement of the child" pending completion of the administrative and judicial proceedings laid out by Congress in Section 1415 of the Act, 20 U.S.C. § 1415, to resolve disputes between parents and the local education agency ("LEA") over identification, evaluation, program, and placement issues and over concerns with the implementation of programming for the student with disabilities. This section provides:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(j). For several reasons, this provision on its face does not apply to the circumstances of the present case. First, at no time during Petitioners' brief residency in the Commonwealth of Pennsylvania was a proceeding "conducted pursuant to" § 1415 pending. The parent did not initiate a due process hearing at the local level until early 1998, several months after relocating himself and his son to New Jersey. Second, when he moved from the

District of Columbia to Radnor Township, the parent – and not the District – removed his son from his "then-current" educational placement. Therefore, maintenance of the "then-current" placement at the Lab School in the District of Columbia was not possible. Third, rather than seek, in this action, to maintain the "then-current educational placement," the parent seeks reimbursement after the fact for a unilaterally-selected new placement that the parent alone determined best replicated the District of Columbia-developed placement at the Lab School. Based upon these distinct facts, the "stay-put" provision of the IDEA does not apply as a legally cognizable basis for the reimbursement of private school tuition according to this Court's decision in *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 366, 126 L.Ed.2d 284 (1993).

Despite the apparent inapplicability of the language of the Act as written to the circumstances of this case, the District does concede that the "stay-put" provision has been construed broadly by this Court as the embodiment of a Congressional "presumption in favor of the child's current educational placement." *Honig*, 484 U.S. at 328, 108 S.Ct. at 606. Viewed thus, the provision was interpreted by this Court to bar the unilateral disciplinary exclusion of dangerous disabled students from school, apparently regardless of whether "proceedings" under Section 1415 were "pending" between the parents of the students and the school district. *Honig*, 484 U.S. at 323-29, 108 S.Ct. at 604-607. While the connection is at best attenuated between the stay-put provision – even construed broadly as in *Honig* – and the purported obligation of one school district to honor the evaluation and IEP of another

from which a disabled student has recently relocated, the Office of Special Education Programs ("OSEP") within the United States Department of Education has made it. The connection – not expressly made in any statutory language or in any controlling judicial interpretation of statutory language – appears in two statements of statutory interpretation and policy issued by OSEP concerning the rights of students with disabilities who transfer among different school districts both intra- and interstate.

Assuming the Court accepts that the "stay put" provision of the IDEA is implicated in some way in the relocation of a student with disabilities from one school district to another, the OSEP policy memoranda require careful scrutiny and lie at the heart of the dispute as it was presented and litigated in this case at the administrative, district court, and court of appeal levels.

As the hearing officer observed in his well-reasoned opinion in this case, which the appeals panel, the district court judge, and the court of appeals upheld, the evidence allows little room to dispute that the District more than complied with the requirements established by OSEP for *inter*state transfers, *see OSEP Policy Memorandum No. 96-5, reprinted in* 24 INDIV. DISABIL. EDUC. L. RPTR. 320 (USDE Dec. 6, 1995).[2] That memorandum presents a logical corollary to the long-standing policy interpretation of OSEP concerning *intra*state transfers. In *Inquiry of Rieser*, OSEP Policy Letter, July 17, 1986, *reprinted in* 2

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[2] A copy of this memorandum is attached hereto at App. 1-6 and shall hereafter be cited simply as the *"OSEP Memorandum."*

EDUC. HANDICAP. L. RPTR. 211: 403 (USDE 1986),[3] OSEP reviewed the written policy of the Pennsylvania Department of Education under which a successor Pennsylvania school district was not bound to implement as "pendent" the placement recommended by a predecessor Pennsylvania school district from which a disabled student had relocated. At the core of the conclusion that "pendency" applies to intrastate transfers was the following analysis:

> [In the case of an intrastate transfer, the] components of placement are found in, or are based on, an IEP developed with the participation of the parents by the previous LEA. That LEA, like the receiving LEA, is an agent of the Commonwealth of Pennsylvania's State Educational Agency (SEA). The SEA is the grantee of EHA funds, and is charged with the responsibility of ensuring the provision of a free appropriate public education through LEAs and other institutions. Once an IEP is developed in an LEA and the IEP is subject to whatever degree of administrative and judicial proceedings the parties elect to pursue, the IEP has the imprimatur of the SEA and carries a presumption of correctness, subject to formal revision as provided in the statute. This does not change when a child moves from one Pennsylvania LEA to another.

Rieser, 2 EDUC. HANDICAP. L. RPTR. 211: 403, at 3; App. at 12-13. The essential core of the analysis is that an IEP developed within a constituent "local educational agency" ("LEA") of a particular State bears the "imprimatur" not just of the LEA but of the State itself

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[3] A copy of this letter is attached hereto at App. 7-14 and shall hereafter be cited simply as "*Rieser*."

and thus enjoys a "presumption of correctness" in every constituent LEA of that State.

This notion of State-level ownership of IEPs developed by its "agent" school districts is entirely consistent with the literal structure and language of the IDEA as it has existed from its inception and as it exists today. As the Third Circuit correctly acknowledged, this notion is completely consistent with the legislative authority for the predecessor of the current Act derived from Congress' spending power, *see* U.S. CONST. Article 1 Section 8, and the legislative design for the Act envisioned by Congress – to encourage States to provide meaningful education to individuals with disabilities. That the Act is long on procedural requirements and short on substantive specifics, leaving the content of each child's "free appropriate public education" to the States, was long ago made clear by the U.S. Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176, 194-96, 102 S.Ct. 3034, 3044-3045, 73 L.Ed.2d 690 (1982) ("the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education"). The "State Educational Agency" ("SEA") is charged under the Act with the direct responsibility of ensuring that all children between the ages of three and twenty-one within the State receive a "free appropriate public education," 20 U.S.C. § 1412(a)(1)(A), an umbrella term referring to the provision of a free preschool, elementary, or secondary education "under public supervision . . . in the State involved" that meets "the standards of the State educational agency," *id.* at § 1402(a)(8). In addition to requiring each of the various States to define the substantive standards for the provision of a "free

appropriate public education" to children with disabilities, the Act requires that each State develop a comprehensive system for the development of appropriate personnel to teach and provide related services to children with disabilities, develop personnel standards, and establish methods and standards for the assessment of the school performance of children with disabilities. *See id.* at §§ 1412(a)(14), (15), and (16).

The responsibilities of the various LEAs are entirely derivative of those of the SEA, and the LEAs can receive IDEA funding from the SEA only when they demonstrate compliance with the requirements of the Act "to the satisfaction of the State educational agency." *Id.* at § 1413(a). Although States can opt to implement a two-tier, local-to-state level administrative hearing system for resolution of disputes concerning the identification, evaluation, program, or placement of, or provision of a free, appropriate public education to, a child with disabilities, the ultimate arbiter of these issues at the administrative level is the SEA. *See id.* at § 1415(f)(1) and (g); *see also Carlisle Area School District v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995), *cert. denied*, 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996) (in reviewing decisions of LEA hearing officers and SEA appeals panels in IDEA cases resolved under Pennsylvania's two-tier system of administrative process, courts must "defer to the appeals panel rather than the hearing officer in most circumstances"). Each individual State that receives federal funding under the IDEA is thus charged with the responsibility of defining the substantive standards for the provision of education to children with disabilities within its borders and for judging ultimately, at the administrative level,

whether the various LEAs have complied with those substantive standards. Each State assures compliance separately by maintaining on file with the USDE a plan outlining its means of implementing educational services for children with disabilities consistent with the broad parameters of the Act. *See* 20 U.S.C. § 1412(a) and (c).

Pennsylvania has fulfilled its role as a recipient of IDEA funds by adopting a comprehensive body of regulations issued by the State Board of Education, *see* 22 Pa. Code Chapt. 14, and standards issued by the Secretary of Education, *see* 22 Pa. Code Chapt. 342. These regulations and standards – unique to Pennsylvania just as the various laws and regulations adopted by the other recipient States are unique to those States – establish numerous requirements governing every aspect of the identification, evaluation, education, and placement of children with disabilities that are designed to implement the requirements of federal law but that do not derive directly from the language of the federal Act. Among these Pennsylvania-specific requirements are an array of staffing and personnel standards, *see* 22 Pa. Code §§ 14.6, 14.8, 342.6, and 342.8; a process of early screening and intervention for students prior to referral to the federally-mandated multidisciplinary team evaluation, *see id.* at §§ 14.23, 14.24, 342.23, and 342.24; standards for the minimum constitution of the multidisciplinary team that evaluates the student to determine eligibility for special education services, *see id.* at §§ 14.25(f), 342.25(d); specific standards for the inclusion of an instructional assessment establishing the rates at which the student can acquire and retain

the content of the regular education curriculum, *see id.* at § 342.25(j); specific schedules for implementing instruction in self-help, social and communication, basic academic, functional academic, and vocational and adult living skills, *see id.* at § 342.25(b)(2); standards for the constitution of the IEP team that ultimately determines whether the student is disabled and, if so, the nature and extent of special programming required to meet his or her unique needs, *see id.* at § 14.32(c); IEP content requirements that expand upon the content mandated by federal law, *see id.* §§ 14.32(f) and 342.32(d); enumeration of a special education intervention hierarchy describing in detail from least restrictive to most the various means of providing support to children with disabilities, *see id.* at §§ 14.42(e) and 342.42(b) and (c); enumeration of specific categories of special education intervention based upon the primary learning needs of the students in the classroom and establishment of class size and caseload maximums and minimums driven by the type and intensity of special education intervention, *see id.* at § 342.42(i) and (j); prescriptions and proscriptions governing discipline and behavior management techniques, *see id.* at §§ 14.35, 14.36, 342.35, and 342.36; and highly-specific rules governing the placement of students in private schools, *see id.* at §§ 14.42, 342.42 and Chapt. 171.

In addition to regulations and standards,[4] the Pennsylvania Department of Education maintains written policies in the form of "Basic Education Circulars" and "Certification and Staffing Policy Guidelines" governing such topics as the meaning of "specially-designed instruction," adherence to the least restrictive environment mandate, and the scope of professional responsibility of teachers holding special education certification in the Commonwealth. *See* BASIC EDUC. CIRC. 22 PA. CODE § 14.1 (PDE 1997); BASIC EDUC. CIRC. 22 PA. CODE § 342.42(c) (PDE 1997); and CERTIF. & STAFFING POLICY GUIDELINE No. 50 (PDE 1992).[5] The Pennsylvania Department of Education, as SEA, retains the authority to approve or disapprove any special education programming offered by the various school districts, or LEAs, "as to location, constitution, and size of classes, conditions of admission and discharge of pupils, equipment, courses of study, methods of instruction, and qualification of teachers," Public School Code of 1949, Act of Mar. 10, 1949, No. 14, P.L. 30, art. XIII, § 1373, *as amended*, 24 P.S. § 13-1373, although it defines its role as one of "general supervision" over the various school districts to which it

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[4] The examples offered from Pennsylvania's special education regulations and standards are but a small sampling of the many provisions therein which are not specifically required by or anticipated in the IDEA. The regulations and standards contain dozens of additional uniquely Pennsylvanian applications of the special education mandate, both procedural and substantive.

[5] Copies of these policies are attached hereto at App. 15-41.

"delegate[s] operational responsibility," 22 Pa. Code § 14.2(b) and (d).

This IDEA-based SEA-LEA agency theory which is consistent with Congress' legislative authority and design in enacting the IDEA, as embodied in Pennsylvania and elsewhere, underlies OSEP's *inter*state transfer policy every bit as much as it underlies its *intra*state transfer policy. The "imprimatur" of one State certainly must be honored by LEAs within that State but has no effect on another State. In *OSEP Memorandum*, OSEP makes clear at the outset that "when a disabled student moves from State A to State B," the "State B school district is not required to adopt the most recent evaluation and implement the most recent individualized education program (IEP) developed for the disabled student by the State A school district." 24 INDIV. DISABIL. EDUC. L. RPTR. at 321; App. at 2-3. OSEP supports this conclusion by re-stating as follows the "State ownership" analysis first employed to the discussion of intrastate transfers in *Inquiry of Rieser*:

> Under Part B [of the IDEA], each State and its local school districts must make a free appropriate public education (FAPE) available to all resident children with specified disabilities in mandated age ranges, and must ensure that the rights and protections of Part B are afforded to eligible students and their parents. 20 U.S.C. § 1412(2) and (5) [now § 1412(a)(1) and (6)]. FAPE includes, among other elements, the provision of special education and related services, at no cost to the parents, that meets State education standards and Part B requirements, in conformity with an IEP. 34 C.F.R. § 300.8 [re-

> promulgated in the proposed new IDEA regulation as § 300.11, *see* 62 FED. REG. No. 204, at 55070-71 (Oct. 22, 1997)]. Thus, the entitlement to FAPE, by its terms, encompasses an appropriate educational program that is individually-designed for each disabled student in accordance with the requirements of Part B *and the educational standards of the State in which the student's parents reside.* In addition, under 34 C.F.R. § 300.600 [same in the proposed new regulation, *see* 62 FED. REG. No. 204, at 55112-13], *each State* must exercise general supervision over all programs in the State that provide educational services to disabled students, *and must ensure that all such programs meet State educational standards* and Part B requirements.
>
> *. . . Since the State A school district's evaluation and IEP were based in part on the education standards and eligibility requirements of State A, the student's evaluation and IEP developed by the State A school district might not necessarily be consistent with the education standards of State B.*

24 INDIV. DISABIL. EDUC. L. RPTR. at 321 (emphasis added); App. at 3-4. The IDEA thus creates a vertical federal-SEA-LEA relationship that supports intrastate pendency and equally does not support horizontal interstate pendency. The *OSEP Memorandum* on interstate transfers is thus fully supported by the language of the IDEA. The policy limiting interstate pendency is at least as well supported as the policy requiring intrastate pendency. In fact, as noted above and as the Hearing Officer in this case pointed out, nothing in the plain language of the "stay put" provision of the IDEA, which on its face governs only the obligation of the LEA to maintain the then-

current placement of a child during due process hearings under the Act, in any way purports to govern the obligations of LEAs in cases of geographic relocation of the child.

Even under the intrastate pendency policy, which Petitioners asked the Third Circuit, the District Court, the panel and the hearing officer to apply in this case to an interstate transfer, Petitioners are arguably not entitled to the relief they seek. In *Inquiry of Rieser*, OSEP recognized the practical reality that a child who relocates from Erie to Philadelphia cannot literally continue to be educated in the same class at the same street address. Thus, OSEP described the "pendency" obligation of the receiving district in an intrastate transfer as follows:

> When a child moves with his parents to a new school district and as a result the child cannot attend the same school, obviously the Act does not require maintaining the placement in the former school district. However, the LEA must maintain, during the pendency of a dispute, the child's "then current educational placement" by providing the complete program of special education and related services described in the existing IEP. For example, if the child received three hours of speech therapy under his/her existing IEP, then he/she must receive three hours of speech therapy by a speech therapist in the new district. If the educational program option (e.g., residential program, regular class, self-contained class) is so intertwined with the goals and objectives that it is a necessary component of the program described in the IEP, then the new LEA must place the child in that type of placement.

> This is not to say that the new LEA must always educate the child in the same type of setting as used by the previous LEA. This will depend on whether the special education and related services in the existing IEP essentially dictate or pre-determine the type of setting that must be chosen. This will depend on the particularities of each child and IEP.

Rieser, 2 EDUC. HANDICAP. L. RPTR. 211: 403, at 3; App. at 13-14. Even a cursory review of the IEP from the District of Columbia establishes that nothing in the goals, objectives, related services, or the equivalent of specially-designed instruction dictates education at the Hill Top School, the placement unilaterally selected by the parent. To the contrary, the uncontested testimony of Dr. Marianne Price, District Director of Pupil Services, established that the District could have implemented the District of Columbia IEP, with all related services, at Radnor High School. While Petitioners believe that much should be made of the lack of knowledge of the District's Director of Pupil Services regarding the differences between Pennsylvania and District of Columbia special education laws, it is beyond question, according to Congress' legislative authority and design in enacting the IDEA, that each LEA in Pennsylvania has the right and the obligation to assure that it is meeting its obligations according to the unique manner envisioned by the Commonwealth, and described in its state plan which has been approved by the USDE, in fulfilling the requirements under the IDEA.

B. The IDEA and Pennsylvania's Special Education Standards and Regulations

Not only does Petitioners' contention[6] related to Pennsylvania's special education and standards establishing a higher standard for "pendency" than federal law fail to establish a compelling reason for this Court to exercise its discretion, their assertion that Pennsylvania has a higher "pendency" standard than is required by federal law and that that more liberal standard should be construed to apply to interstate transfers, is baseless. There is no mention whatsoever of interstate transfers anywhere in either the Pennsylvania standards or the Pennsylvania regulations. Not only do the 1990 standards and regulations fail to extend "pendency" law beyond the status in which it existed by statute, regulation, and decision at the time, those standards and regulations are the product of a Commonwealth in which the articulated policy through July of 1986 was not to apply pendency even to *intra*state transfers, *see Inquiry of Rieser*, 2 EDUC. HANDICAP. L. RPTR. 211: 403, at 1; App. at 8.

For the foregoing reasons, Petitioners cannot establish, on the uncontroverted facts of this case, that the actions of the District in August of 1997 and during the first six weeks of the 1997-1998 school term violated the

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[6] The District is responding to the contention related to a higher standard for pendency according to Pennsylvania law notwithstanding the fact that while this issue was raised as a question for this Court, it was not briefed in the petition for writ of certiorari.

IDEA. Therefore they have failed to establish a compelling reason for this Court to exercise its discretion to review the Third Circuit's decision that

> [B]ecause Congress left primary responsibility for providing a FAPE and for implementing the IDEA to the states, we believe it unlikely that Congress intended the stay-put provision, which dates back to 1975 and the IDEA's predecessor statute, to impose a requirement on states that they must implement an IEP established in another state without considering how consistent that IEP is with the policies and mandates of the student's new residential state.

Judgment of the United States Court of Appeals for the Third Circuit, dated January 14, 2000, Appendix to Petition to Writ of Certiorari at 22a.

II. The Constitutionally Protected Right to Interstate Travel Did Not Require the District to Implement an Out-of-State IEP.

Petitioners assert that the refusal of the District to place the student in the private school of the parent's choice immediately upon their relocation to Pennsylvania, and the insistence on the part of the District that it conduct an evaluation and develop an IEP in accordance with Pennsylvania law prior to committing to any program and placement other than an interim one, impaired their constitutionally protected "right to interstate travel." Petitioners cite and rely heavily upon the recent decisions of this Court in *Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) (involving relocation from Colorado, Louisiana, and Oklahoma to California),

and the Third Circuit in *Maldonado v. Houstoun*, 157 F.3d 179 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130, 119 S.Ct. 1802, 143 L.Ed.2d 1007 (1999) (involving relocation from Puerto Rico to Pennsylvania) in support of the proposition that movement into a new State of residence should not result in the receipt of lesser benefits than those enjoyed by current residents of the State. Their reliance on these cases in the instant matter is ill-founded. At issue in both the *Saenz* and *Maldonado* cases were welfare benefits legislation requiring, among other things, that a family, relocating to State A from State B[7] who qualified for cash assistance in State A, receive during its first twelve months of residency in State A the lesser of: (1) the benefit level available to similarly situated State A residents of twelve months or more, or (2) the benefit level the family would have been eligible to receive in State B had they not moved to State A. *See Saenz*, 526 U.S. at 492-95, 119 S.Ct at 1521-22; *Maldonado*, 157 F.3d at 182.

The issue thus confronting the *Saenz* and *Maldonado* courts was the constitutionality of employing a durational residency criterion to limit the amount of a benefit for which the recent residents in question had qualified using the new state of residency eligibility criteria. *See Saenz*, 526 U.S. at 496-97, 119 S.Ct at 1523; *Maldonado*, 157 F.3d at 183. The plaintiffs in *Saenz* and *Maldonado* were not seeking what Petitioners in effect are seeking in the present case, to impose upon Pennsylvania officials an

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[7] For purposes of this analysis, the District uses the term "State" to mean each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

eligibility determination and benefits status established in another State. The *Saenz* and *Maldonado* plaintiffs entered the new States of residency, applied and were determined to be eligible for benefits, and sought only to obtain those benefits which a twelve-month resident who had done the same would have received. *See Saenz*, 526 U.S. at 496-97, 119 S.Ct. at 1523; *Maldonado*, 157 F.3d at 183. In Pennsylvania, all students evaluated and placed in special education for the first time must submit to the Pennsylvania multidisciplinary team evaluation and IEP team process, regardless of the duration of their residency. Petitioners here, by contrast, entered Pennsylvania for the first time and sought to force upon a Pennsylvania school district, prior to completion of the mandated multidisciplinary team evaluation and IEP team process, acceptance of their unilaterally obtained approximation of the benefits provided by the District of Columbia. In doing so, Petitioners sought and continue to seek a greater benefit under the IDEA than a longer-term Pennsylvania resident could possibly receive as it relates to pendency at the expense of all the other standards established by the Commonwealth of Pennsylvania for its implementation of the IDEA.

The District recognizes, of course, that the decision of the parent in this case to relocate to Pennsylvania deprived the student of continued placement at the Lab School in the District of Columbia. The parent might well have believed, moreover, that placement in Hill Top would ease somewhat the hardship caused by the relocation. The constitutional right to travel, however, is not tantamount to a guarantee that the effects of interstate travel will be painless. The Third Circuit considered this

reality of interstate relocation in a decision concerning a challenge to a Pennsylvania bar admissions rule restricting the ability of attorneys from other States to practice law upon relocating to Pennsylvania. The Court offered the following analysis in rejecting the challenge:

> This is not to say that [the Rule in question] is no impediment to plaintiffs' freedom of movement. Surely, the Rule has some deterrent effect on nonresident attorneys who wish to migrate to Pennsylvania but choose not to because they are ineligible to sit for the Pennsylvania bar examination. However, the Constitution does not guarantee that citizens of State A may move to State B and enjoy the same privileges they did as citizens of State A, only that citizens of State A may move to State B and be treated on similar terms as the citizens of State B. *See Toomer v. Witsell*, 334 U.S. 385, 395, 68 S.Ct. 1156, 1161-62, 92 L.Ed. 1460 (1948) (construing U.S. Const. Art. IV, § 2). Nor does it "require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." *Leis v. Flynt*, 439 U.S. 438, 443, 99 S.Ct. 698, 701, 58 L.Ed.2d 717 (1979) (per curiam).

Schumacher v. Nix, 965 F.2d 1262, 1267-68 (3d Cir. 1992), *cert. denied*, 507 U.S. 908, 113 S.Ct. 1252, 122 L.Ed.2d 651 (1993). The Third Circuit thus recognized that differences in State laws can have a deterrent effect on the decision to move interstate without offending the constitutional proscription against restrictions on interstate travel, as long as the law bears a rational relationship to some legitimate state purpose. *Id.*

Even if this Court were to apply the compelling interest standard suggested by Petitioners, however, the

Court should still affirm the decision of the Third Circuit. The application of the law in the manner supported by the Court of Appeals created no distinctions between the student as a new resident of the District and other Pennsylvania residents. The student was entitled to a Pennsylvania evaluation and a Pennsylvania-approved IEP, and had the student relocated to Erie, Pennsylvania rather than New Jersey, he would have taken with him the right to have that Pennsylvania IEP implemented by the Erie School District. This rule serves both the compelling state interest as well as the legitimate purpose of the IDEA in assuring that every child residing in Pennsylvania, whether newly arrived or indigenous, is evaluated by Pennsylvania trained and certified professionals and has a program based thereon developed by Pennsylvania teachers familiar with Pennsylvania practice and procedure for implementation in Pennsylvania schools. Indeed, the implementation of the *OSEP Memorandum*, with which the District more than complied, actually afforded the student greater rights than a similarly-situated Pennsylvania resident would have enjoyed. A newly referred Pennsylvania resident without a Pennsylvania-developed IEP establishing his need for special education and related services would have had to remain in regular education with no supports pending the completion of an evaluation and IEP team meeting. The Petitioner student, upon entering Pennsylvania also without a Pennsylvania-developed IEP, was offered special education services, following an IEP team meeting to which his parent was invited, without waiting. *OSEP Memorandum, reprinted in* 24 INDIV. DISABIL. EDUC. L. RPTR. at 321; App. at 3-5.

For the foregoing reasons, Petitioners cannot establish, on the uncontroverted facts of this case, that the actions of the District in August of 1997 and during the first six weeks of the 1997-1998 school term violated the right to interstate travel.

CONCLUSION

For the foregoing reasons, the District respectfully requests that this Court reject the Petition for Writ of Certiorari of Michael C. and Stephen C.

Respectfully submitted,

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24 IDELR 320

OSEP Memorandum 96-5 (Interstate Transfers)

Office of Special Education Programs

December 6, 1995

Thomas Hehir Director Office of Special Education Programs

- Evaluations, Evaluation Generally
- Individualized Education Program (IEP), In General
- Placement, Change in Residence
- U.S. Department of Education, Office of Special Education Programs (OSEP)

Summary

OSEP issued a policy guidance outlining the procedures to be followed by states and school districts when students with disabilities transfer interstate. As a preliminary matter, OSEP cautioned that although Part B does not require that the latest evaluation and IEP developed by the student's former school district in another state (A) be adopted by the school district in the new state (B), the student's rights must not be compromised during the transfer process. District B's first step is to determine whether to adopt the most recent evaluation and IEP. As part of that process, it must ascertain whether a disability exists and whether the evaluation and IEP comply with the state's education standards and Part B. If it accepts the determination that the student is disabled and the evaluation, it must notify the student's parents as required by Part B. The former IEP can be adopted and an IEP

meeting does not have to be held if the former IEP is available, the parents agree to its use, it can be implemented, and it is appropriate. If the former IEP is refused by the new district or the parents, an IEP meeting must proceed in accordance with Part B timelines. If the former evaluation is rejected by the new district, an evaluation must be conducted "without undue delay." The parents must receive notice, as well as consent – as it is treated as a preplacement evaluation. During the evaluation, the student should be placed pursuant to an agreed-upon interim IEP, or in regular education in absence of such an agreement. After the evaluation, Part B's procedures for developing an IEP should be followed. Due process is available for parents who disagree with proposed evaluations and IEPs, and pending a due process request, the student can be placed in any mutually agreed-upon placement. However, if no mutually agreeable placement can be determined, the district is not obligated to adopt the former IEP or provide the former services. In that situation, placement should be regular education pending the resolution of the placement dispute in accordance with 34 CFR 300.513(b) of Part B's stay-put provision.

The Department has received a number of requests for clarification of the requirements of Part B of the Individuals with Disabilities Education Act (Part B) that are applicable when a disabled student moves from State A to State B (referred to as an interstate transfer). Although it is our conclusion that, under Part B, the State B school district is not required to adopt the most recent evaluation and implement the most recent individualized

education program (IEP) developed for the disabled student by the State A school district, State B and its responsible school district must ensure that the rights of the disabled student and his or her parents are not compromised when an interstate transfer occurs. The following guidance should assist States and school districts in safeguarding the rights of disabled students and their parents in interstate transfer situations.

Under Part B, each State and its local school districts must make a free appropriate public education (FAPE) available to all resident children with specified disabilities in mandated age ranges, and must ensure that the rights and protections of Part B are afforded to eligible children and their parents. 20 U.S.C. § 1412(2) and (5). FAPE includes, among other elements, the provision of special education and related services, at no cost to the parents, that meets State education standards and Part B requirements, in conformity with an IEP. 34 CFR § 300.8. Thus, the entitlement to FAPE, by its terms, encompasses an appropriate educational program that is individually-designed for each disabled student in accordance with the requirements of Part B and the education standards of the State in which the student's parents reside. In addition, under 34 CFR § 300.600, each State must exercise general supervision over all programs in the State that provide educational services to disabled students, and must ensure that all such programs meet State education standards and Part B requirements.

When a student moves from a school district in State A to a school district in State B, the State B school district first must ascertain whether it will adopt the most recent evaluation and IEP developed for the student by the State

A school district. Since the State A school district's evaluation and IEP were based in part on the education standards and eligibility requirements of State A, the student's evaluation and IEP developed by the State A school district might not necessarily be consistent with the education standards of State B.[1] Therefore, the State B school district must determine, as an initial matter, whether it believes that the student has a disability and whether the most recent evaluation of the student conducted by the school district in State A and the State A school district's IEP meet the requirements of Part B as well as the education standards of State B. If the State B school district accepts State A's determination that the student has a disability and adopts the State A school district's evaluation, the school district in State B must provide notice to the students' parents in accordance with 34 CFR § 300.504(a).

The school district in State B also could elect to implement the most recent IEP developed by State A's school district, provided that it determines that this IEP meets Part B requirements and State B's education standards. The school district in State B would not be required to conduct another IEP meeting if a copy of the current IEP is available, the parents indicate that they are satisfied with that IEP, and the school district in State B believes that the IEP is appropriate for the student and that it can implement that IEP. Appendix C to 34 CFR Part

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[1] When a disabled student changes school districts in the same State, the Part B requirements are different. For a discussion of the Part B requirements that govern inter-district transfer situations, *See EHLR* 213:265.

300 (question 6). However, if the parties are not satisfied with the IEP developed for the student by the school district in State A, an IEP meeting would have to be conducted without undue delay, but in no case later than 30 calendar days after the date that the school district in State B determined that it would accept the State A school district's eligibility determination and evaluation. Appendix C at question 6; See also 34 CFR § 300.343(c).

If the school district in State B elects not to adopt the State A school district's evaluation of a student who transfers into its jurisdiction, the school district in State B must evaluate the student without undue delay and provide proper notice to parents. 34 CFR §§ 300.128, 300.220 and 300.504(a). The evaluation would be treated as a preplacement evaluation of the student under 34 CFR § 300.531, and the school district in State B must obtain parental consent under 34 CFR § 300.504(b)(1)(i) before conducting this evaluation. While the evaluation is in process, the school district in State B could serve the student in a special education placement in accordance with an interim IEP unless the parents and State B school district are unable to agree on an interim placement, in which case, the student would be placed in the regular school program. Once the school district in State B completes the student's evaluation, an IEP meeting must be convened without undue delay, but in no case later than thirty calendar days after the date of the eligibility determination. 34 CFR § 300.343(c). At this IEP meeting, the State B school district must develop and adopt an IEP for the student that addresses his or her unique educational needs.

If the student's parents disagree either with the State B school district's evaluation or the IEP proposed for the student by the State B school district, they could initiate an impartial due process hearing under 34 CFR § 300.506. During the pendency of the hearing, the student could be placed in the program proposed for the student by the State B school district, with the parents' agreement, or in another placement on which the parents and State B school district agree. However, if the parents do not agree to place the student in the program proposed by the State B school district and no other interim placement can be agreed upon, the State B school district is not required to implement the IEP developed for the student by the school district in State A, or to approximate the services contained in the State A school district's IEP during the pendency of authorized review proceedings. Rather, in such a situation, the State B school district would place the student in the regular educational program in accordance with 34 CFR § 300.513(b).

We trust that the above policy will assist officials of your State and local school districts in interstate transfer situations and will serve to limit unnecessary interruptions in the provision of needed instruction and services to disabled students. Further questions can be directed to the contact person listed in this memorandum or to Dr. JoLeta Reynolds at (202) 205-5507.

211:403

Rieser, Letter to (Assessment)

Office of Special Education Programs

Leonard Rieser, Education Law Center, Inc., 2100 Lewis Tower Building, 225 South 15th Street, Philadelphia, PA 19102

[Editorial Note: See 2 EHLR 211:354 for earlier correspondence with OSEP and 1978-85 Section 504 Rulings 257:534 for related OCR Complaint Letter of Finding.]

Digest of Inquiry

When a student moves from one school district to another within the same state, may the receiving school district refuse to implement the IEP developed by the sending school district even if the parents object to such a change in program?

Digest of Response

When a student moves from one school district to another within the same state, the receiving school district must implement the IEP developed by the sending school district including "elements of placement that are inherent in the IEP" during the pendency of proceedings.

Text of Inquiry

On May 24, 1984 ___ nearly two years ago ___ I filed a complaint with the Office of Special Education Programs concerning Pennsylvania's policy on inter-district transfers of special education students. Basically, the complaint is that, when a student moves from one school district to another, the "new" district is not required to implement the student's Individualized Education Program (IEP) *even pending its reevaluation of the student and/or revision of his or her program*. On the contrary, according to the state's policy, the parent must either accept whatever changes the new district unilaterally makes in the child's program, or have the child placed in regular education. I need hardly add that for most parents of handicapped children this is no choice at all, since returning the child to a regular class is usually a complete impossibility.

Since filing the complaint, I have made the following inquiries concerning its status:

1. August 17, 1984: I wrote to Dr. Wendy Cullar about the status of the matter and received no reply.

2. December 20, 1984: I again wrote to Dr. Cullar who wrote back to inform me that I would be notified as soon as a decision on the complaint was reached.

3. April 17, 1985: Dr. Shirley Jones informed me that the complaint was still awaiting decision but was "next up" for consideration.

4. November 14, 1985: I wrote to you concerning the matter. Due to some mix-up, your reply (dated November

21) pertained to a different case. I wrote again on November 26.

5. January, 1986: I spoke with Ms. Patricia Guard about the status of the matter; she indicated that a decision should be forthcoming shortly.

In addition, I have had many telephone conversations with various other members of your staff concerning the matter.

I appreciate the courteous responses that I have received in response to my inquiries. However, I am also concerned with obtaining a decision for my clients, to whom this is an important issue that can have a significant effect on their children's lives.

Under the Education of the Handicapped Act, the Department has a *duty* to ensure that state plans and policies concerning special education conform to the Act's requirements. 20 U.S.C. Sec. 1413(c). In my view, therefore, the Department is required to act on this complaint. As we approach the two-year mark, I again request that action be taken. I hope that a decision will be reached promptly and that we will not need to pursue the matter further.

Thank you for your assistance.

Text of Response

I am writing in response to your letter of April 25, 1986 and your earlier letters on the issue of what special education and related services are to be provided, pending a resolution through a due process proceeding, to a handicapped child who moves from one school district to

another within a State. In your May 24, 1984 letter, you asked "whether, if the 'new' district proposes to change the child's IEP [individualized education program] and the parent objects to such change, the existing IEP must be implemented during the pendency of any reevaluations of the child and any administrative and/or judicial proceedings." As described below, the Office of Special Education Programs (OSEP) concludes that, during the pendency of proceedings when a child moves from one local educational agency (LEA) to another within a State, the new or "receiving" LEA must implement the IEP developed by the previous LEA, including elements of placement that are inherent in the IEP.

The Education of the Handicapped Act (EHA), at 20 U.S.C. Sec. 1415(e)(3), states:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

This is stated in similar fashion in the regulations implementing EHA, at 34 CFR 300.513.

The statute and regulations distinguish between "initial admission to a public school" and all other situations. In the situation raised in your letter, the child had previously been evaluated and found to be handicapped within the meaning of EHA, and had been provided

special education pursuant to an IEP. We conclude that the child's arrival at a new LEA does not constitute an initial admission to a public school and that the "initial admission" portion of the statute is not applicable here. The purpose of the initial admission provision is to ensure that children applying to a public school for the first time will not be required to remain outside of school pending completion of the review process. Without this provision the remaining part of 20 U.S.C. Sec. 1415(e)(3) would require the child applying for initial admission to remain outside of public education. The purpose and language of the initial admission provision is inapplicable here, because the child has in fact been educated in another public school district in the State. In *McCowen v. Hahn*, (ND IL 1981) 1981-82 EHLR DEC. 553:131, 134 the court states, "to construe 'initial admission' as anything other than the child's first admission to a public school program would render the word 'initial' superfluous."[1]

Because the transfer from one Pennsylvania LEA to another is not an initial admission, the statute requires that the child's "then current educational placement" be

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[1] This is consistent with previous OSEP statements. In a June 17, 1980 letter, OSEP stated:

> "Initial placement" is not defined either in the statute or the Part B regulations. This Office has interpreted this term to mean that a child is entering special education for the first time. 2 EHLR DEC. 211:212, 215 (1980). Therefore, if a child changes school districts, OSEP has advised the States that the type of consent required in the use of an initial placement is not required.

maintained. Congress, by enacting the pendency provision, has expressed a clear preference for the status quo. *Doe v. Brookline School Committee*, 722 F.2d 910, 915 (1st Cir. 1983). To allow a new LEA to place the child in a regular education program or provide an interim IEP without parental consent would defeat the purpose of the statutory provision ___ "to guarantee a coherent educational experience for a disabled child until conclusion of review of a contested IEP." *Id.* In *Tokarcik v. Forest Hills School District*, 665 F.2d 443, 453 (3rd Cir. 1981), *cert. den.*, 458 U.S. 1121 (1982), the Third Circuit observed, "Section 1415(e)(3) at a minimum guarantees that the most recently agreed upon program cover any unresolved interim" pending challenge to an existing IEP.

The phrase "then current educational placement" is not defined by the statute or the regulations. As used in varied contexts throughout the regulations, however, "educational placement" encompasses at least three components. The first component is the educational program option which involves the type of placement, for example, a residential program or a regular class or self-contained class. The second component is the educational program contained in the IEP including annual goals, short-term objectives and related services. The third and final component is the specific school or facility which the child attends. These are also the ingredients in the "status quo" which the courts interpreting the statute have required be maintained during the pendency of proceedings.

In the situation raised in your letter, these components of placement are found in, or are based on, an IEP developed with the participation of the parents by the

previous LEA. That LEA, like the receiving LEA, is an agent of the Commonwealth of Pennsylvania's State educational agency (SEA). The SEA is the grantee of EHA funds, and is charged with the responsibility of ensuring the provision of a free appropriate public education through LEAs and other institutions. Once an IEP is developed in an LEA and the IEP is subject to whatever degree of administrative and judicial proceedings the parties elect to pursue, the IEP has the imprimatur of the SEA and carries a presumption of correctness, subject to formal revision as provided in the statute. This does not change when a child moves from one Pennsylvania LEA to another.

When a child moves with his parents to a new school district and as a result the child cannot attend the same school, obviously the Act does not require maintaining the placement in the former school district. However, the LEA must maintain, during the pendency of a dispute, the child's "then current educational placement" by providing the complete program of special education and related services described in the existing IEP. For example, if the child received three hours of speech therapy under his/her existing IEP, then he/she must receive three hours of speech therapy by a speech therapist in the new district. If the educational program option (*e.g.*, residential program, regular class, self-contained class) is so intertwined with the goals and objectives that it is a necessary component of the program described in the IEP, then the new LEA must place the child in that type of placement.

This is not to say that the new LEA must always educate the child in the same type of setting as used by

the previous LEA. This will depend on whether the special education and related services in the existing IEP essentially dictate or pre-determine the type of setting that must be chosen. This will depend on the particularities of each child and IEP.

In summary, we conclude as follows: When a handicapped child transfers from one school district to another within a State, the receiving LEA must maintain the child's "then current educational placement" during the pendency of any reevaluation or administrative and judicial proceedings. EHA does not require maintaining the placement in the former school district. However, the new LEA must provide the complete program of special education and related services as described in the child's IEP, including the goals and objectives and the educational program option if that type of placement (*e.g.*, regular class, self-contained class, residential placement) is so intertwined with the goals and objectives that it is a necessary component of the program described in the IEP.

Thank you for bringing this matter to our attention. We hope you find this information helpful.

Patricia J. Guard
Acting Director
Office of Special Education Programs

BEC-Specially Designed Instruction

Basic Education Circular

SUBJECT: Specially Designed Instruction
22 Pa. Code Section 14.1

DATE OF ISSUE: September 1, 1997

DATE OF EXPIRATION: June 30, 2000

This BEC was last revised prior to June 4, 1997, the date on which the Individuals with Disabilities Education Act (IDEA) was amended (P.L. 105-17). Therefore, the advice herein may not be consistent with current federal law. Consequently, school districts and their solicitors should check the underlying statutory law, and be responsive to concerns raised by parents and their advocates. This material is being reviewed for necessary revisions as provisions of the law are phased into effect and regulations are promulgated. If specific concerns arise, please call the Contact Bureau/Office listed on this BEC.

This Basic Education Circular clarifies the Department's position on specially designed instruction as part of special education. Although 22 Pa. Code Chapters 14 and 342 do not define it in detail, specially designed instruction is a major element of the general definition of special education at Section 14.1:

> Special education – Specially designed instruction to meet the needs of an exceptional student, including specifically designed instruction that is the following:

(i) Conducted in the classroom, in the home, in community settings, in hospitals, in institutions and in other settings.

(ii) Provided in an instructional or skill area, including physical education, speech and vocational education.

Specially designed instruction consists of adaptations or modifications to the general education curriculum, instruction, instructional environments, methods, or materials for exceptional students. It may also include a life skills curriculum for students with moderate to severe disabilities. Such specially designed instruction must go beyond the services and programs that a student would receive as part of general education, and must be designed to meet the unique needs of the student.

Specially designed instruction is a required field on early intervention and school age Individualized Education Program (IEP) formats. The Bureau of Special Education has included an appropriate item in its compliance monitoring instrument to assure the existence of specially designed instruction on the IEPs.

Under Section 14.1, students are identified as exceptional when they have a disability or are gifted and, therefore, need special education. Thus, specially designed instruction is the special education which a student needs. Exit criteria, which is a required field in IEPs under Section 342.32(d)(5), is objective criteria by which it may be determined that a student is no longer in need of the specially designed instruction noted in the IEP.

REFERENCES:

State Board of Education Regulations

22 Pa. Code Chapter 14

Department of Education Standards

22 Pa. Code chapter 342

Federal Statutes

20 USC 1400 et seq., (IDEA)

Federal Regulations

34 CFR Part 300

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BEC-Inclusion of Special Education Students

Basic Education Circular

SUBJECT: Inclusion of Special Education Students 22 Pa. Code Section 342.42(c)

DATE OF ISSUE: September 1, 1997

DATE OF EXPIRATION: June 30, 2002

This BEC was last revised prior to June 4, 1997, the date on which the Individuals with Disabilities Education Act (IDEA) was amended (P.L. 105-17). Therefore, the advice herein may not be consistent with current federal law. Consequently, school districts and their solicitors should check the underlying statutory law, and be responsive to concerns raised by parents and their advocates. This material is being reviewed for necessary revisions as provisions of the law are phased into effect and regulations are promulgated. If specific concerns arise, please call the Contact Bureau/Office listed on this BEC.

SUMMARY

The term "inclusion" has become common in discussions of the placement of special education students, but the term has no legal definition. The term denotes the "least restrictive environment" rules that have been part of the special education law for close to two decades. The term also connotes an emphasis on active social membership in a class or community, and carries with it a need for teacher training and school district preparation. The

term "inclusion" does not represent a legal requirement that every child be educated in the same way or in the same place.

With this working definition in mind, PDE supports inclusion. PDE supports inclusion because it is essentially a restatement of well established law, and because it represents sound educational practice for large numbers of students with disabilities. PDE supports inclusion through personnel training and technical assistance, through the development of local capacity to include students successfully, and through the Department's general supervision of special education in the Commonwealth.

DISCUSSION

A. Quality and Location

Special education is a service, not a place. The purpose of special education parallels the purpose of elementary and secondary education as a whole: to prepare children to lead productive independent lives as citizens and members of an adult community. Exceptional students often need exceptional interventions, so that they may eventually lead regular lives to the greatest extent possible. Thus, special education services remain highly valued.

As we strive to maintain and improve the quality of special education services, there is increasing emphasis on where we provide special education. This is as it should be. The degree of "integration" or "inclusion" is important for two reasons. First, contact with nondisabled peers can have positive social effects both on

children with disabilities and on their typical classmates. Second, education with nondisabled peers can have positive learning effects. For many, the result is that children with disabilities learn more in inclusive environments.

B. Terminology

The terminology surrounding the issue has evolved as it has become part of our popular culture. Terms such as "mainstreaming," "least restrictive environment," "integration" and "inclusion" each have different connotations. As the Department uses it, the term "inclusion" implies more than ensuring the mere physical proximity between students with and without disabilities. It connotes a full participation and equality as part of a group, leading to a sense of belonging within the community at large. Inclusion does not necessarily mean that a student never leaves the class or the group of students of which he or she is a part. It means, rather, that a student is truly a member of, not merely a visitor to, the class or group. As the Department uses the term, "inclusion" is synonymous with what is sometimes called "supported inclusion," because the term implies that the student and teacher will receive the supports they need.

The term "full inclusion" is also heard, and used by some to mean the inclusion of every student with a disability in a regular classroom, without exception. Neither the law nor the Department takes such an absolutist approach. The law requires educators to provide more than a "one size fits all" placement option. In order to ensure that all needs are met, a continuum of placements

that vary in their restrictiveness is required. That continuum exists in Pennsylvania; there is a rich enough supply of diverse programs in Pennsylvania that a greater dispersion of sound inclusive or integrative practices does not threaten the loss of alternative placement options.

More to the point is the observation made by many Pennsylvanians that whether a child with a disability is placed in a regular classroom depends in part on the school district in which the family lives. Although examples of successful inclusive practices can be found across the Commonwealth, districts appear to vary in their current capacity to make all of the necessary services available in the regular classroom.

Our experience suggests that very similar children are integrated with supports into regular classes in some schools but not in others. While we know that children vary, it is reasonably clear also that the school districts are frequently the controlling variable in deciding whether more integrated or more segregated special education placements will be made. This is not appropriate; in some cases, it is of questionable legality. An uneven distribution of inclusive practices and policies is more important to the Department and to Pennsylvania's families than a theoretical discussion about absolutes that does not sufficiently recognize individual differences.

There are a number of myths or misconceptions concerning inclusion that should be dispelled:

- Inclusion is not a new legal requirement. The legal requirements of inclusion are the "least restrictive environment" requirements that have been in place for close to two decades.

– Inclusion is not a mandate that all children with disabilities be educated solely in the regular classroom. The law still requires that educators have available a continuum of alternative placements to suit diverse needs.

– Inclusion is not designed to save money. Often, inclusion may be less expensive or may equal the cost of alternative placements; but this is neither its purpose nor a necessary result.

– Inclusion is not a dumping of students in a regular class without special supportive services. Special services, referred to in law as "supplementary aids and services," are at least as important to student with disabilities in regular classes, if not more important, than such services are to students with disabilities in segregated settings.

– Inclusion is not a procedure for leaving a regular classroom teacher with greater challenges and no increase in resources. The needs of the special education student in an inclusive placement will not decrease, at least in the short run. Therefore, the responsibilities of the regular classroom teacher will often increase, thus increasing the need for training, consultation, collaborative planning time, paraprofessionals, and continuous communication between classroom teacher and special education specialist. The Department's approach to special education recognizes the need for training both special and regular education teachers, in 22 Pa. Code Section 342.7(c). For inclusion to work well, it is important for the classroom teacher to have regular access to special education specialists and other support staff who can help the teacher

devise and deliver the supports and modifications that will permit all of the children in the class to benefit.

– Inclusion does not mean that special education students must have the same curricular goals as all other students. Our expectations for students with disabilities may be higher than has traditionally been the case, but the curriculum and the goals for students with disabilities in the regular classroom can (and often should) be different than the curriculum and goals for other students in the class.

C. Basis in Law

The legal underpinning for what we call inclusion is not new and is essentially unchanged. From a legal perspective, the core of the matter is the set of similar "least restrictive environment" requirements in statutes and regulations at the state and federal level. According to Pennsylvania's regulations and standards, at 22 Pa. Code Section 342.42(c):

(1) Exceptional students, including students in public or private institutions or other care facilities, shall be educated to the maximum extent appropriate with students who are not exceptional.

(2) The removal of exceptional students from the regular educational environment shall occur only when the nature or intensity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

D. Basis in Sound Educational Practice

The most important limit on the extent to which inclusion is appropriate is the ability of the educational profession to plan for a particular child in a regular class. The ability of the profession to succeed with students with disabilities has increased dramatically in recent years. Inevitably, some of us are ahead of others in acquiring the skills and attitudes necessary to succeed with students with disabilities through inclusive practices. The most demanding part of the legal standard, however, is that each school district must become prepared to do what the profession as a whole is capable of doing in the area of inclusion. For example, the Department understands the law as not respecting an argument that "Even if the school district over there can do it, my school district cannot." Nor do the courts permit teachers to refuse to implement an agreed-upon individualized education program.

In the area of inclusion, there is a demanding relationship between law and practice. That is: We in the teaching profession determine, through our actions, the outer limits of what we can practice successfully; but once success in inclusion is achieved somewhere in the profession, the law virtually requires that this increased capability be replicated throughout the field.

E. The Planning Process

Inclusion frequently requires planning and a reallocation of resources by a school district, but it is not something that must be earned by the student. The "least

restrictive environment" rules establish a preference for educating students with disabilities in the regular class. Consideration of the regular class must be the starting place for any decision-making about the placement of any special education student. This is both the law of the land and the policy of the Department. The preference creates a rebuttable presumption that the student will be educated in the regular class. The presumption is rebutted only if it is objectively determined that no set of services can feasibly be established to allow the child to succeed in the regular class. The courts have said that, in making this determination, factors such as class disruption, distortion of the curriculum for the class as a whole, and cost can be taken into account. It appears from the court decisions, however, that these factors will override the positive factors relating to the benefit to the child only in relatively rare cases. Thus, the benefits of inclusion to the child with a disability are the primary consideration, but not the only consideration.

An inclusive placement is not dependent on a demonstration or prediction that there will be an incremental or additional benefit from inclusion. A child need not prove his or her way into a regular class or regular school building. Rather, the "benefits" test is simply whether an appropriate education can be provided in the regular environment. In order to assess whether appropriate educational benefits can be provided in a regular class or other environment, one must look at that environment in two ways: (1) as it is, and (2) as it might be when augmented with supplementary aids and services. Thus, the fact that a child might not be able to succeed in a class as it is does not mean that inclusion is not feasible. The

feasibility of inclusion is to be assessed in light of the services that can be brought to the child. Many services are portable. That is, it is possible to bring them to the child rather than removing the child to the service. Professional judgments as to what services are portable are thus important when considering whether a child is to be included or removed from the regular education environment. Those judgments are to be made, in the first instance, on a case-by-case basis by local school district IEP teams that include the child's parents.

F. Capacity-Building

The phrase "supplementary aids and services" incorporates all of the modifications and innovations of which a school district is reasonably capable. This covers a wide variety of techniques. Implementing these techniques in order to facilitate inclusion is both legally required and desirable. Therefore, it is the policy of the Department to assist school districts and others in building a capacity to implement effective aids, services, and modifications to enable students with disabilities to succeed in regular settings. The Department recognizes the importance of this capacity-building effort because, as mentioned above, Pennsylvania educators inevitably differ in their acquisition of the skills necessary to make inclusion work for increasing numbers of students. Integration without the necessary teaching skills is of course not the goal.

The Department does not believe that mindless, unplanned integration is notably superior to mindless, unplanned segregation. Rather, the Department believes that skilled and thoughtful inclusion for increased

numbers of Pennsylvania children with disabilities is both a legal requirement and a proper educational goal.

This goal is not beyond our collective reach, but requires a commitment to taking advantage of, and learning from, those who have been successful. To assist in this process, the Department continues to operate the Instructional Support System of Pennsylvania (ISSP), which includes a number of initiatives for teacher training and capacity-building.

The Department supports these initiatives because the Department perceives that inclusion is as much about teachers and administrators as it is about students. This kind of effort is also a legal requirement, in federal regulations at 34 CFR Section 300.555(b). Children do not have to prove that they are "ready" for inclusion; the adults who provide educational and related services in Pennsylvania, however, may have to increase their capacity to use effective techniques for making successful inclusion generally available. From a legal perspective, a lack of teacher training is unlikely to constitute a successful defense in any conflict over inclusion. Teacher training and technical assistance, however, is an important part of the Department's approach to inclusion.

Technical assistance cannot be successful if the recipient does not desire the assistance. Thus, the attitudes of local school boards, school administrators, and teachers will be powerful factors in determining whether we meet our respective legal obligations. The Department seeks a willing partnership with local boards, administrators, and teachers in building our collective capacity to serve children well in their neighborhood schools and regular

classrooms. Without a meaningful partnership, the Department's primary mechanism for progress would be limited to monitoring and compliance activities. These activities, however valuable, should not be our primary way of making progress.

G. Conclusion

The courts and the Department want the same things:

– individualized planning using the full potential of the MDT and IEP processes;

– recognition of particular educational, social, and communications needs of individuals and groups, and a recognition of how natural social interaction and effective communication makes educational achievement more likely;

– a careful analysis of needed services, for the purpose of determining whether those services are sufficiently "portable" to be included as part of a regular class placement;

– organization of schools so that classroom teachers have the training and support needed to allow the classroom teacher and the students to succeed;

– education in the regular classroom whenever possible, and a full continuum of alternative placements for those cases in which students cannot succeed even in enhanced regular classes; and

– an application of the successful practices already being used by some, across an increasing number of schools and school districts.

To accomplish these goals, and thus to implement the least restrictive environment requirements that have long been part of special education law, special education and special educators will continue to be vital, and will evolve as a more unified system of education becomes a reality for more students. A willingness to learn from the successful experiences of others, and a willingness to create one's own success through innovative inclusion programs, will remain crucial. It is the Department's policy to encourage this sense of willingness, and to capitalize on it by fostering the knowledge and the practice of inclusion of students with disabilities in regular settings.

One way for school districts to organize their thinking and planning on this issue, and to assess whether further work is necessary, is to consider the attached "inclusion checklist for your school." We infer from the checklist that its author believes that there are concrete steps that local officials can take to promote inclusion. The Department agrees, and believes that taking such steps is the right thing for Pennsylvania school districts to do, both legally and educationally.

REFERENCES:

State Board of Education Regulations

22 Pa. Code Sections 14.41-14.45

22 Pa. Code Section 14.56

Department of Education Standards

22 Pa. Code Section 342.41-42.46

Federal Statute

20 U.S.C. 1412(5)(B) and 1414(a)(1)(C)(iv), (IDEA)

Federal Regulations

34 C.F.R. Sections 300.550-300.556

Other

Oberti v. Clementon School District, 995 F.2d 1204 (3d Cir.1993)

ATTACHMENT:

An Inclusion Checklist for Your School

CONTACT BUREAU/OFFICE:

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AN INCLUSION CHECKLIST FOR YOUR SCHOOL

___1. Do we genuinely start from the premise that each child belongs in the classroom he or she would otherwise attend if not disabled (or do we cluster children with disabilities into special groups, classrooms, or schools)?

___2. Do we individualize the instructional program for all the children whether or not they are disabled and provide the resources that each child needs to explore individual interests in the school environment (or do we tend to provide the same sorts of services for most children who share the same diagnostic label)?

___3. Are we fully committed to maintenance of a caring community that fosters mutual respect and support among staff, parents, and students in

which we honestly believe that nondisabled children can benefit from friendships with disabled children and disabled children can benefit from friendships with nondisabled children (or do our practices tacitly tolerate children teasing or isolating some as outcasts)?

___4. Have our general educators and special educators integrated their efforts and their resources so that they work together as integral parts of a unified team (or are they isolated in separate rooms or departments with separate supervisors and budgets)?

___5. Does our administration create a work climate in which staff are supported as they provide assistance to each other (or are teachers afraid of being presumed to be incompetent if they seek peer collaboration in working with students)?

___6. Do we actively encourage the full participation of children with disabilities in the life of our school including co-curricular and extracurricular activities (or do they participate only in the academic portion of the school day)?

___7. Are we prepared to alter support systems for students as their needs change through the school year so that they can achieve, experience successes, and feel that they genuinely belong in their school and classes (or do we sometimes provide such limited services to them that the children are set up to fail)?

___8. Do we make parents of children with disabilities fully a part of our school community so they also can experience a sense of belonging (or do we give them a separate PTA and different newsletters)?

___9. Do we give children with disabilities just as much of the full school curriculum as they can master and modify it as necessary so that they can share elements of these experiences with their classmates (or do we have a separate curriculum for children with disabilities)?

___10. Have we included children with disabilities supportively in as many as possible of the same testing and evaluation experiences as their nondisabled classmates (or do we exclude them from these opportunities while assuming that they cannot benefit from the experiences)?

This checklist may help school personnel in evaluating whether their practices are consistent with the best intentions of the inclusion movement. Rate your school with a + for each item where the main statement best describes your school and a 0 for each item where the parenthetical statement better describes your school. Each item marked 0 could serve as the basis for discussion among the staff. Is this an area in which the staff sees need for further development? Viewed in this context, an inclusive school would not be characterized by a particular set of practices as much as by the commitment of its staff to continually develop its capacity to accommodate the full range of individual differences among its learners.

NOTE: The checklist is reproduced from an article by Joy Rodgers in the May 1993 Research Bulletin of the Center for Evaluation, Development, and Research, Phi Delta Kappa, Bloomington, Indiana.

CSPG-50, Special Education Certification-Corrected

CSPG No. 50 (Corrected April 16, 1992)
Page 1 of 5
April, 1992

Special Education Certification and Assignment Scope (K-12)

General Information

Chapter 5, 22 Pennsylvania Code, Curriculum Regulations, provides the planned course as the basic format by which all developed curriculum is recorded for each school entity. Chapter 14, Special Education Regulations, provides for the implementation of special education curriculum. Chapter 342, Standards for Special Education, Section 342.38, states that special education curriculum shall be adapted, whenever possible, from regular curricula. Accordingly, a school entity is required to provide planned courses for special education. It is necessary for the entity to determine the extent to which special education students shall be taught the curriculum of regular education or the curriculum designed for special education. It is on this curriculum determination that staffing decisions must be made.

Course structure and composition will vary within each school entity depending on the type of needs of the students to be served. Accordingly, staffing patterns also will vary. This CSPG is intended to assist the chief school officer in ensuring that all staff involved in instruction are appropriately certified and qualified for the courses they are teaching. The provisions of this CSPG and CSPG

No's. 80 and 80A establish parameters for special education and regular education certification and staffing. The state is prepared to provide the parameters in which staffing takes place; however, it is the responsibility of the chief school officer to exercise discretion in the selection and assignment of staff according to the particular curriculum needs of the students that staff serves.

Special Education and Regular Education Planned Courses

Of interest here are two general categories of certificates namely special education and regular education (elementary/secondary level subject areas). A person holding a certificate endorsed in one of the four special education areas is qualified to teach students with disabilities how to understand, overcome, compensate for and/or adjust to their disability through the use of adaptive instructional strategies, instructional accommodations, individualized learning activities and specially designed services. In addition, these persons are qualified to instruct in specific subject areas if the curriculum they teach is adjusted to the needs and abilities of identified students with disabilities and is different in learning objectives, content and instructional times, instructional methods and materials, expected levels of achievement or procedures for evaluation from those planned courses used to instruct regular education students of comparable chronological age.

Staffing Special Education Classes

When a student's IEP prescribes a regular education planned course, designed to satisfy the secondary education curriculum requirements prescribed in Chapter 5, a person teaching that course must be appropriately certified in the subject area. Special education certification is not appropriate in this instance. Conversely, when a student's IEP prescribes a special education planned course designed to satisfy the special education needs of the student, then the person teaching the course must be appropriately certified in the special education area.

LEA Responsibilities

The determination as to whether a regular education or special education planned course is appropriate rests with the school entity's officials. However, the IEP should clearly state the specific curriculum needs of the students. Without the IEP documentation and planned course differentiation, the state cannot support the local entity's choice of staffing in the event there are questions regarding the propriety of staffing. Therefore, it is critical that local school officials in staffing their regular education or special education programs, ensure that clearly defined and categorized planned courses are in place and that students' IEP's clearly prescribe curriculum needs.

Further Clarification of Roles

In addition to instructing special education students with IEP prescribed special education curriculum, the

following roles are also the responsibilities of special education certified teachers.

1. A person holding a certificate endorsed for Hearing Impaired, Deaf, Hard-of-Hearing, Hearing Handicapped, or Speech-Hearing Handicapped is qualified to render diagnostic, prescriptive and therapeutic services in instructional programs designed to serve handicapped students having hearing disorders.

2. A person holding a certificate endorsed for Visually Handicapped or Visually Impaired is qualified to render diagnostic, prescriptive and therapeutic services in instructional programs designed to serve students who are blind or partially sighted.

3. A person holding a certificate endorsed for Mentally Retarded, Physically Handicapped, Socially and Emotionally Disturbed, Emotionally Disturbed, or Mentally and/or Physically Handicapped is qualified to render diagnostic, prescriptive and therapeutic services in instructional programs designed to serve students having one or more of the following disabilities: mentally retarded, brain injured, physically handicapped, learning disabled, and socially and/or emotionally disturbed.

4. A person holding a certificate endorsed for Speech and Language Impaired, Speech Correctionist, Speech and Hearing Disorders, or Speech Correction is qualified to render diagnostic, prescriptive and therapeutic services in instructional programs designed to serve students having speech

and language disorders. A person so certified is qualified to assist subject area or special field teachers in rendering instructional accommodations and adaptive instructional strategies to students having speech and/or language disorders in conjunction with the subject area, or special field teacher's delivery of planned courses.

Letters of Authorization

5. Through school year 1975-76, some public school entities received written authorization from the Department of Education to assign persons certified in Elementary Education to teach pupils having learning difficulties and requiring remedial instruction in areas of the curriculum of the elementary schools. Such authorizing letters used the term "learning disabled classes" and, subsequently, some holders of these letters were assigned to teach special classes of students classified as learning disabled. Such departmental authorization was discontinued before the opening of school year 1976-77 and, except for incumbents holding these letters, certification for Mentally Retarded and/or the endorsement areas indicated in Section 4 above, has been considered the only qualification to teach learning disabled classes. A person holding a Letter of Authorization is qualified to continue in the assignment provided the following conditions exist:

   - Employed as a temporary professional or professional emp!oye[e] and not as a substitute.

- Was employed during School Year 1986-87 with an uninterrupted service record in the assignment.
- Otherwise lacks qualification and appropriate certification for the assignment.
- Has not been furloughed or placed on a recall list having previously held such assignment.

6. Within a Department of Education approved plan of Special Education providing for services rendered to students and while held in a detention home and centers and classified as special education, a person holding certification endorsed as indicated in Section 3 above is qualified to render diagnostic, prescriptive and therapeutic services in instructional programs designed for such students.

   A person holding a certificate endorsed for Social Restoration is qualified to provide these students the services attendant to the Social Restoration Certificate. (See CSPG No. 49)

7. A person holding a Supervisory Certificate endorsed for Special Education is qualified for assignment as a supervisor in that area of instruction. Additionally, the Supervisory Certificate endorsed for Special Education qualifies the holder to serve in any of the following assignments (as described in PDE Budgetary Controls for Special Education Programs):

   - "Director of Special Education"

– "Supervisor of Special Education"

8. A person holding a certificate endorsed for an area of Special Education and who is engaged in cooperative activity within a Special Education program also must hold certification for Cooperative Education to be qualified for such assignment. (See CSPG No. 59)

9. Since Special Education is an Instructional Certification area, school entities are encouraged to assign this responsibility to a Supervisor of Curriculum and Instruction rather than to a Supervisor of Pupil Personnel Services. (See CSPG No. 41)

   When the Supervisor of Pupil Personnel Services is assigned responsibility for a Special Education program, specifically developing special education curriculum and evaluating and supervising special education staff and instruction, the person must hold the Supervisor of Special Education Certificate also. (See CSPG No. 42)

10. The School Psychologist, Supervisor of School Psychological Services, or Supervisor of Pupil Personnel Services are within the Educational Specialist Certification areas who render support services to professionals in special education. Therefore, service as a certified School Psychologist will not satisfy the experience required for issuance of a Supervisor of Special Education certificate.

Definitions

Terms which must be understood in order to plan appropriately for the transition of the special education student from school to life, as listed in Special Education Planned Course Guidelines, PDE, February 1987, are provided as follows:

High School Diploma

Each eligible student who satisfactorily completes a special education program developed by an IEP team shall be granted and issued a regular high school diploma by the district of residence upon completion of that program if one of the following conditions prevails:

(1) The student is no longer of school age.

(2) Any time after age 18, if the principal certifies that the student's IEP has been completed in accordance with Chapter 342.

IEP (Individualized Education Program)

The IEP is an annual written plan defining the education that will be provided a specific student. Planned Courses serve as a resource for developing the elements of the IEP.

Special Education Planned Course

A course which is taught by a teacher with special education certification. The levels of intervention may be one of the following: Supportive intervention in the regular class, supplemental intervention in the regular classroom,

supplemental intervention in the resource classroom, part-time special education class in the regular school, full-time special education class in the regular school, full-time special education class outside of the regular school.

Regular Education Planned Course

A course which is taught by a teacher with certification in this specific subject. A Regular Education Planned Course is considered to be in the mainstream of the school's course offerings rather than in special education. The teacher adapts the Regular Education Planned Course to offset specific problems of students with disabilities and identifies instructional methods appropriate to the students.

THIS REVISION SUPERSEDES ALL EARLIER CSPG'S CARRYING THIS NUMBER AND/OR ADDRESSING THIS SUBJECT. PREVIOUS CSPG PRINTING DATES ON THIS SUBJECT: 10/76, 1/87, 1/89.